Supreme Court, U.S.
FILED
JAN 17 1991
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-50

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ELLIS GREGORY, JR. and ANTHONY P. NUGENT, JR., Judges,
Petitioners,

v.

JOHN D. ASHCROFT, Governor of the State of Missouri,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE PETITIONERS

THOMAS J. GUILFOIL
JIM J. SHOEMAKE
BRUCE DAYTON LIVINGSTON
Counsel of Record
Guilfoil Petzall & Shoemake
100 North Broadway, Suite 2000
St. Louis, Missouri 63102
(314) 241-6890

Attorneys for Petitioners

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

QUESTIONS PRESENTED

I.

Whether appointed Missouri state court judges are "appointee[s] on the policymaking level" within the meaning of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-34 (1988), and thus exempted from the ADEA's general prohibition of mandatory retirement and subject to the mandatory retirement provision of Article V, Section 26 of the Missouri Constitution.

II.

Whether the mandatory retirement at age seventy of Missouri state court judges, pursuant to Article V, Section 26 of the Missouri Constitution, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, given Missouri's selective imposition of mandatory retirement only upon its judges over age seventy among all of its employees in non-physically demanding jobs including judges under the age of seventy.

LIST OF PARTIES

The plaintiffs in the proceeding below, in addition to the petitioners, Judges Ellis Gregory, Jr. and Anthony P. Nugent, Jr., were Judges Douglas W. Greene and Flake L. McHaney. Respondent John D. Ashcroft, Governor of the State of Missouri, was the only defendant below. The United States Equal Employment Opportunity Commission appeared as *amicus curiae* in the court of appeals.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
1. Introduction	4
2. Statutory Framework Of The ADEA	5
3. Organizational Framework Of The Missouri Judiciary	5
4. Proceedings In The District Court	7
5. Proceedings In The Court Of Appeals	8
SUMMARY OF ARGUMENT	8
ARGUMENT	12
I. AS APPOINTED JUDGES NOT-"ON THE POLICYMAKING LEVEL" PETITIONERS ARE PROTECTED "EMPLOYEE[S]" UNDER THE ADEA AND ARE NOT SUBJECT TO THE MISSOURI CONSTITUTION'S MANDATORY RETIREMENT PROVISION	12

A. The ADEA Applies To The States And Protects State Employees Above Age Forty, So Long As Those Employees Do Not Fall Within The Statutory Exemptions From The Definition of "Employee." 12

B. Petitioners And Other Similarly Situated State Court Judges Who Have Been Appointed To Office Pursuant To The Missouri Plan Do Not Fall Within The Scope Of The "Elected To Public Office" Exemption From The ADEA's Definition Of "Employee." 13

C. The Remaining Exemptions From The ADEA Definition Of "Employee," Including That For An "Appointee On The Policymaking Level," Are Limited To Persons Who Work In Conjunction With Or At The Direction Of The Elected Official Who Appointed Them. 15

1. The Exemptions From The ADEA Definition Of "Employee" Should Be Construed Narrowly 15

2. The Plain Language And Organization Of The Remaining Statutory Exemptions Indicates That The "Appointee On The Policymaking Level" Exemption Includes Only Those Persons Who Make Or Implement Policy In Conjunction With Or At The Direction Of The Elected Official Who Appointed Them 16

3. The Legislative History Indicates That The "Appointee On The Policymaking Level" Exemption Includes Only Those Persons Who Implement Or Formulate Policy In Conjunction With Or At The Direction Of The Elected Official Who Appointed Them 18

D. Missouri's State Court Judges Are Not "Appointee[s] On The Policymaking Level" Because (1) They Are Not Policymakers and (2) They Do Not Work With, At The Direction Of, Or As Advisors to The Appointing Authority, As The Exemption Should Be Construed To Require 22

1. Missouri State Court Judges Are Not Policymakers. 22

2. Missouri State Court Judges Are Not "Appointees On The Policymaking Level" Because They Do Not Work Closely With, At The Direction Of, Or As Advisors To The Appointing Authority, The Governor 24

E. Conclusion 26

II. THE MISSOURI CONSTITUTION'S MANDATORY RETIREMENT PROVISION VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION. 26

CONCLUSION 32

TABLE OF AUTHORITIES

Page

Cases:

A. H. Phillips, Inc. v. Walling, 324 U.S. 490 (1945) 15,16

Bader Realty & Investment Co. v. St. Louis Housing Authority, 358 Mo. 747, 217 S.W.2d 489 (1949) (*en banc*) ... 22

Brinkmann v. Common School Dist. No. 27, 238 S.W.2d 1 (Mo. Ct. App. 1951) 22

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) 8,28-30

Cruzan v. Director, Missouri Dept. of Health, __ U.S. __, 110 S. Ct. 2841 (1990) 23

EEOC v. First Catholic Slovak Ladies Assoc., 694 F.2d 1068 (6th Cir. 1982), *cert. denied*, 464 U.S. 819 (1983)..... 15

EEOC v. Illinois, 721 F. Supp. 156 (N.D. Ill. 1989)..... 16

EEOC v. Massachusetts, 858 F.2d 52 (1st Cir. 1988)..... 14,16

EEOC v. Massachusetts, 680 F. Supp. 455 (D. Mass. 1988)..... 16

EEOC v. Vermont, 904 F.2d 794 (2d Cir. 1990) 14,18,20,22,24

EEOC v. Wyoming, 460 U.S. 226 (1983)..... 13

Gregory v. Ashcroft, 898 F.2d 598 (8th Cir. 1990) (App. A in Petition) ..... *passim*

Gregory v. Ashcroft, No. 88-0221-C-(3) (E.D. Mo. July 14, 1989) (App. B in Petition) 14,27

In re Pate, 107 S.W.2d 157 (Mo. Ct. App. 1937)..... 25

International Telephone & Telegraph Corp. v. Smith, 687 S.W.2d 194 (Mo. 1985) (*en banc*)..... 25

Jarecki v. G. D. Searle & Co., 367 U.S. 303 (1961) 17

Lorillard v. Pons, 434 U.S. 575 (1978) 18

Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976 28,30,31

McConnell v. Beverly Enterprises-Connecticut, Inc., 209 Conn. 692, 553 A.2d 594 (1989) 23

National Ass'n of Greeting Card Publishers v. U.S. Postal Serv., 462 U.S. 810 (1983) 19

O'Neil v. Baine, 568 S.W.2d 761 (Mo. 1978) (*en banc*) 7,27

Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979)..... 18

Peyton v. Rowe, 391 U.S. 54 (1968)..... 15

Schlitz v. Virginia, 681 F. Supp. 330 (E.D. Va.), *rev'd on other grounds*, 854 F.2d 43 (4th Cir. 1988) 22

State ex rel. Dahl v. Lange, 661 S.W.2d 7 (Mo. 1983) (*en banc*) 25

State v. One "Jack and Jill" Pinball Machine, 224 S.W.2d 854 (Mo. Ct. App. 1949) 23

Tcherepnin v. Knight, 389 U.S. 332 (1967)..... 15

Third National Bank v. Impac Ltd., Inc., 432 U.S. 312 (1977) 17

Vance v. Bradley, 440 U.S. 93 (1979) 29

Wasinger v. Labor and Industrial Relations Comm'n, 701 S.W.2d 793 (Mo. Ct. App. 1985) 25

Western Airlines, Inc. v. Criswell, 472 U.S. 400 (1985) 15

Constitutions:

Mo. Const. art. II, § 1 25

Mo. Const. art. V, § 1 5

Mo. Const. art. V, § 3 5

Mo. Const. art. V, § 10 5

Mo. Const. art. V, § 14 5

Mo. Const. art. V, § 15 5,24

Mo. Const. art. V, § 16 5

Mo. Const. art. V, § 24 30

Mo. Const. art. V, § 25 6

Mo. Const. art. V, § 25(a) 4,6,13,14

Mo. Const. art. V, § 25(c)(1) (Appendix C in Petition) 6,14

Mo. Const. art. V, § 25(d) 6

Mo. Const. art. V, § 25(f) 14

Mo. Const. art. V, § 26 3-5

U. S. Const. amend. XIV, § 1 2

Statutes:

Mo. Rev. Stat. § 115.321 (1986) 6

Mo. Rev. Stat. § 115.339 (1986) 6

Mo. Rev. Stat. § 476.683 (Cum. Supp. 1989) 7

Mo. Rev. Stat. § 478.010 (1986) 6

Mo. Rev. Stat. § 478.014 (1986) 5

28 U.S.C. § 1254(1) (1988) 2

29 U.S.C. § 621(b) (1988) 12,15

29 U.S.C. § 623(a) (1988) 2,5,12,13

29 U.S.C. § 630(b) (1988) 5,12

29 U.S.C. § 630(f) (1988) ..... *passim*

29 U.S.C. § 631(a) (1988) 3,5,12

42 U.S.C. § 2000e(f) (1988) 18

Age Discrimination in Employment Act of 1967, Pub. L. 90-202, 81 Stat. 602, *as amended and codified*, 29 U.S.C. §§ 621-34 (1988) 4,12

Pub. L. 99-592, 100 Stat. 3342 (1986) 12

Pub. L. 95-256, 92 Stat. 189 (1978) 12

Pub. L. 93-259, 88 Stat. 55 (1974) 12

Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 (1972) 18

Lesiglative History:

Conference Report on H.R. 1746 (Section-by-Section Analysis), 118 Cong. Rec. 7166-67 (1972) 17,19,21

H.R. Conf. Rep. No. 899, 92nd Cong., 2d Sess. (1972) 19-20

Joint Explanatory Statement of Managers at the Conference on H.R. 1746, 92d Cong., 1st Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137 19,21

Amendment No. 888 to S. 2515, 92nd Cong. 2d Sess., 118 Cong. Rec. 4095 (1972), *reprinted in*, Senate Subcomm. on Labor of the Comm. on Labor and Public Welfare, *Legislative History of the Equal Employment Opportunity Act of 1972* (1972) 20

118 Cong. Rec. 4096 (1972) 19

118 Cong. Rec. 4097 (1972) 20

118 Cong. Rec. 4492-93 (1972) 20,21

Other Authorities:

Brief Amicus Curiae Of American Association Of Retired Persons, *Gregory v. Ashcroft*, No. 90-50, (U.S. *cert. granted* Nov. 26, 1990) 31

Brief of Amicus Curiae The Honorable John W. Keefe, *Gregory v. Ashcroft*, No. 90-50 (U.S. *cert. granted* Nov. 26, 1990) 28

No. 90-50

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ELLIS GREGORY, JR. and ANTHONY P. NUGENT, JR., Judges,
Petitioners,

v.

JOHN D. ASHCROFT, Governor of the State of Missouri,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion, Petition at A-1 to A-16 and judgment, J.A. at 11, of the Court of Appeals is reported at 898 F.2d 598. The district court opinion by Judge William L. Hungate is unreported, but is reprinted in the Petition at A-17 to A-26.

JURISDICTION

The opinion and judgment of the court of appeals were entered on March 5, 1990. J.A. at 11. On May 24, 1990 Justice Blackmun extended the time for filing a petition for a writ of certiorari until July 3, 1990.

Petitioners timely filed their petition on July 3, 1990, Petition at 16, and this Court therefore has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The ADEA section that prohibits age discrimination provides:

It shall be unlawful for an employer —

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 623(a).

The ADEA definition of an "employee" provides:

> The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

29 U.S.C. § 630(f).

The ADEA section that prescribes "age limits" provides: "The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age." 29 U.C.S. § 631(a).

Article V, Section 26 of the Missouri Constitution ("the Mandatory Retirement Provision") provides:

> (1) All judges other than municipal judges shall retire by the age of seventy years, except as provided in the schedule to this article, under a retirement plan provided by law.
>
> (2) All judges may retire at an earlier age authorized by law and may participate in a retirement plan provided by law.
>
> (3) Any retired judge, associate circuit judge or commissioner, with his consent, may be assigned by the supreme court as a senior judge to any court in this state or as a special commissioner. When serving as a senior judge he shall have the same powers as an active judge.

Mo. Const. art. V, § 26.

Article V, Section 25(a) of the Missouri Constitution ("the Judicial Appointment Provision") provides:

> Whenever a vacancy shall occur in the office of judge of any of the following courts of this state, to wit: The supreme court, the court of appeals, or in the office of circuit or associate circuit judge within the city of St. Louis and Jackson county, the governor shall fill such vacancy by appointing one of three persons possessing the qualifications for such office, who shall be nominated and whose names shall be submitted to the governor by a nonpartisan judicial commission established and organized as hereinafter provided. If the governor fails to appoint any of the nominees within sixty days after the list of nominees is submitted, the nonpartisan judicial commission making the nomination shall appoint one of the nominees to fill the vacancy.

Mo. Const. art. V, § 25(a)

STATEMENT OF THE CASE

1. Introduction. Petitioners are Missouri state court judges. This case addresses whether a Missouri constitutional provision which mandates that Missouri's state court judges retire upon attaining the age of seventy, Mo. Const. art. V, § 26 ("the Mandatory Retirement Provision"), contravenes either the Age Discrimination in Employment Act of 1967, Pub. L. 90-202, 81 Stat. 602, *as amended and codified*, 29 U.S.C. §§ 621-34 (1988) ("the ADEA") or the Fourteenth Amendment to the United States Constitution.

The first question presented requires statutory interpretation to determine whether petitioners fall within the scope of the ADEA term, "appointee on the policymaking level." An "appointee on the policymaking level" is exempted from inclusion as a protected "employee" under the ADEA. 29 U.S.C. § 630(f). The other question presented is whether the State of Missouri's imposition of a mandatory retirement age upon only its judges over age seventy, among all of its employees in non-physically demanding jobs including judges under the age of seventy, violates the Equal Protection clause of the Fourteenth Amendment to the United States Constitution.

2. Statutory Framework Of The ADEA. The ADEA prohibits employers from discharging any "employee" because of the individual's age and from classifying its "employee[s]" in ways that adversely affect an individual's status as an employee because of the individual's age. 29 U.S.C. § 623(a). The state of Missouri is an "employer" under the ADEA. *Id.* § 630(b). The ADEA protects individuals who are at least forty years of age, *id.* § 631(a), who are employed by an "employer," *id.* § 630(f), and who are not otherwise exempted from status as an "employee." *Id.* Of the statutory exemptions, two are relevant to this case, those for "an appointee on the policymaking level" and for "any person elected to public office in any State or political subdivision of any State by the qualified voters thereof." *Id.*

3. Organizational Framework Of The Missouri Judiciary. For purposes of this case the Missouri judiciary is composed of the Missouri Supreme Court, the Missouri Court of Appeals and the Missouri Circuit Courts.[1] Mo. Const. art. V, §1. Circuit judges and associate circuit judges are both judges of the circuit courts, *see* Mo. Const. art. V, §§ 15-16, although in some respects — such as the power to make local rules — associate circuit judges are not endowed with all the powers that are granted to circuit judges. *Id.* § 15(1). *See also* Mo. Rev. Stat. § 478.014 (1986) (distinguishing between circuit judges and associate circuit judges with respect to salary). All of the judges of these courts "shall retire at the age of 70 years." Mo. Const. art. V, § 26.

A bifurcated judicial selection system exists in Missouri. Under the Missouri Non-Partisan Court Plan ("the Missouri Plan"), Mo. Const.

---

[1] Municipal judges are not subject to the Mandatory Retirement Provision and therefore are not discussed in this section. The Missouri Supreme Court has limited, exclusive appellate jurisdiction over certain cases, as well as generally discretionary appellate jurisdiction over cases decided in the court of appeals. Mo. Const. art. V, §§ 3, 10. The Missouri Court of Appeals has general appellate jurisdiction except where the Missouri Supreme Court has been vested with exclusive appellate jurisdiction. *Id.* § 3. The circuit courts have original jurisdiction of all civil and criminal cases and matters. *Id.* § 14.

art. V, § 25, the governor of the state of Missouri appoints judges[2] to fill vacancies in all of Missouri's appellate courts, and in the circuit courts in metropolitan St. Louis and Kansas City. *Id.* § 25(a). Judges in the circuit courts outside these two metropolitan areas are not appointed by Governor Ashcroft pursuant to the Missouri Plan, but instead are elected in partisan primary and general elections. Mo. Rev. Stat. § 478.010 (1986). *See id.* §§ 115.339, 115.321 (candidates "for elective office" must file for nomination through primary election or as an independent candidate).

Judges like petitioners, who have been appointed to office pursuant to the Missouri Plan, do not run for re-election against opponents in partisan elections. Appointed, "Missouri Plan" judges are periodically listed on the ballot as subject to the questions of retention, although they face only a "yes or no" vote on whether each "shall be retained in office." Mo. Const. art. V, § 25(c)(1). In contrast, the non-Missouri Plan, elected circuit judges from outside the Kansas City and St. Louis metropolitan area, *e.g.*, former plaintiff McHaney,[3] are subject to opposed, partisan re-election contests. *Compare* Mo. Rev. Stat. § 478.010 (election of circuit judges who are not subject to the Missouri Plan)[4] *with* Mo. Const. art. V, § 25(c)(1) (retention question under the Missouri Plan), *reprinted in* Petition at A-27 to A-28.

---

[2] The Governor selects the person to be appointed as judge from a panel of three candidates chosen by a Non-Partisan Judicial Commission. Mo. Const. art. V, §§ 25(a), 25(d).

[3] Judge Flake L. McHaney reached age seventy on September 25, 1990. He did not seek an injunction and retired without seeking review in this Court.

[4] Section 478.010 provides in pertinent part:

> Except as provided in section 25 of article V of the Constitution of Missouri, the circuit judges of the various judicial circuits shall be elected at the general elections as herein provided and at the general election every six years thereafter. . . .

Mo. Rev. Stat. § 478.010

4. Proceedings In The District Court. Petitioners and two other Missouri state court judges filed suit in the United States District Court for the Eastern District of Missouri to challenge the validity of the Mandatory Retirement Provision. Petitioners claimed that the Mandatory Retirement Provision[5] violated both the ADEA and the Equal Protection Clause of the Fourteenth Amendment. J.A. at 3-9. Governor Ashcroft responded to the Supplemental Complaint by filing a motion to dismiss. J.A. at 10.

On July 14, 1989 United States District Judge William L. Hungate granted the motion to dismiss. The district court held that Missouri's appointed state court judges were not "elected *to* public office," and therefore were not exempted from the ADEA's definition of "employee" on that ground. Petition at A-20 n.3 (emphasis by the district court). Judge Hungate ruled, however, that appointed state court judges are exempted from ADEA coverage under another portion of 29 U.S.C. § 630(f) as "appointee[s] on the policymaking level." Petition at A-20 to A-22

In dismissing petitioners' equal protection claim, the district court ruled that Missouri has a rational basis for its imposition of a mandatory retirement age upon its judges. Petition at A-23. Judge Hungate relied upon a Missouri Supreme Court opinion, *O'Neil v. Baine*, 568 S.W.2d 761 (Mo. 1978) (*en banc*), as support for his finding that Missouri has a rational basis for the Mandatory Retirement Provision. Among the rational bases found by the district court were that the Mandatory Retirement Provision would insure a vigorous, healthy and vital judiciary, avoid the difficult decision of determining whether judges are incompetent after a certain age, increase the opportunity for younger persons to serve in the judiciary, and assure predictability and ease in administering judges' pension plans. Petition at A-24 to A-25.

---

[5] The plaintiffs in the district court also challenged the validity of Senate Bill 425, *codified at* Mo. Rev. Stat. § 476.683 (Cum. Supp. 1989), which provides for the automatic forfeiture of salary and retirement compensation in the event that a judge who has attained age seventy does not retire. J.A. at 3-9.

5. Proceedings In The Court of Appeals. Petitioners and the other plaintiff judges appealed the dismissal of their ADEA claim on the ground that judges are not "appointee[s] on the policymaking level."[6] Writing for the Eight Circuit panel, Judge Pasco M. Bowman affirmed the district court's dismissal of petitioners' complaint, Petition at A-3, and agreed that appointed judges are exempted from the ADEA's definition of "employee" as "appointee[s] on the policymaking level." Petition at A-6 to A-8. In reaching this conclusion Judge Bowman stated that judges occasionally resolve unsettled issues and thus "create law," as well as "exercise considerable policymaking responsibility in the supervision of the Missouri court system." *Id.*

In affirming the district court's dismissal of petitioners' constitutional claim, the Eighth Circuit agreed that the bases for the Mandatory Retirement Provision, as expressed by the Missouri Supreme Court in *O'Neil v. Baine*, were indeed rational. Petition at A-14 to A-16. Petitioners had argued that the Mandatory Retirement Provision was constitutionally deficient under *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), because the state was relying "on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." Brief for the Appellants at 16-17 (8th Cir. filed Sept. 15, 1989) (quoting *Cleburne*, 473 U.S. at 446). Although the Eighth Circuit acknowledged that "[o]ne might disagree with some or all of these rationales," it nevertheless held that the Mandatory Retirement Provision had a rational basis sufficient to withstand constitutional scrutiny. Petition at A-16.

SUMMARY OF ARGUMENT

Petitioners are protected "employees" under the ADEA. The ADEA applies to the states, and the state of Missouri is an "employer"

[6] Governor Ashcroft did not cross-appeal the district court's ruling that appointed state court judges are not subject to the "elected to public office" exemption under section 630(f). *See* Petition at A-5. The governor had argued unsuccessfully in the district court that the "elected to public office" exemption was applicable to appointed judges that are subsequently retained in office by a vote of the electorate. Suggestions In Support Of Defendant's Motion To Dismiss at 7, No. 88-0221-C-3 (E.D. Mo. filed Oct. 19, 1988).

under the Act. Missouri state court judges work for the state of Missouri. Accordingly, petitioners are "employee[s]" under the ADEA, unless they fall within the scope of one of the specific statutory exemptions from status as "employee[s]."

The ADEA is a remedial statute combating the perceived evil of age discrimination. The class of people protected by the ADEA should therefore be construed liberally and exemptions from the protected class should be construed narrowly. This construction is supported by the conference report in the legislative history, which specifically states that the exemptions should be construed narrowly.

As appointed Missouri Plan judges, petitioners are not exempted from status as "employee[s]" under the ADEA. First, Missouri Plan judges are not "elected to public office"; they are appointed to office by Governor Ashcroft. Second, Missouri Plan judges are not otherwise exempted as "appointee[s] on the policymaking level."

The plain language and organization of the statutory exemptions dictates that appointed state court judges are not "appointee[s] on the policymaking level." The policymaking exemption is placed in the middle of a list of three exemptions that follow the "elected to public office" exemption. The first of those three exemptions applies to persons on the elected official's personal staff; the third applies to close advisers of the elected official. Both the first and third exemption clearly apply only to persons who are in a close working relationship with an elected official. Under well accepted rules of statutory construction, the term placed in the middle of a list should be construed in the context of the surrounding terms. Therefore, the policymaking exemption should be construed to involve a relationship with the elected official like that of his "immediate adviser" or "personal staff" members. Thus, the "appointee on the policymaking level" exemption should only include persons who implement or formulate "policy" in conjunction with or at the direction of the elected official.

The legislative history supports petitioners' argument that the policymaking exemption only applies to persons in a close working relationship with an elected official. The overall purpose of the

policymaking exemption was to make the ADEA applicable to the states. The "elected to public office" exemption from the definition of "employee" was derived from a perceived need to insulate elected officials from claims of age discrimination by the electorate. The other exemptions in addition to that for persons "elected to public office" were drafted to include ancillary advisers of elected officials, thereby insuring that newly elected officials would be able to employ people of their own choosing to advise and assist the newly elected officials in formulating and supporting their own policies.

Missouri state court judges are not such persons. The Separation of Powers provision of the Missouri Constitution prohibits the judicial branch of the government from working with or assisting the legislative or executive branches of government. Moreover, judges simply are not policymakers; they are required to leave policymaking to the other branches of government. Judges do not give advisory opinions. Their primary responsibility is to apply existing law to actual cases or controversies and to leave questions of policy to the other branches of government. Accordingly, the policymaking exemption is not applicable to appointed state judges.

Under the U.S. Constitution's Fourteenth Amendment petitioners and other Missouri judges of age seventy are denied equal protection under the law by the Mandatory Retirement Provision's requirement that only judges of age seventy retire, among all the state employees in non-physically demanding jobs — including judges younger than age seventy. Although age is not a suspect class and this Court has determined that traditional rational basis analysis is the appropriate standard of review, the classification at issue cannot even pass muster under the rational basis test.

With the exception of the purpose of insuring a physically and mentally fit judiciary, all of the reasons asserted by the state in its interrogatory answers as justification for the Mandatory Retirement Provision (and assumed as true by the Eighth Circuit) are equally applicable both to judges younger than age seventy and to all other state employees in non-physically demanding jobs — groups upon whom Missouri does not impose mandatory retirement. Judges of age

seventy do not threaten the interests of the state of Missouri in ways that other state employees over age seventy do not and in ways that younger judges do not. Therefore, the mandatory retirement of judges at age seventy, based on the reasons other than mental and physical fitness that were identified by the State and lower courts in this case, is irrational and violates the Fourteenth Amendment on its face.

Likewise, unless Missouri can establish that the age seventy retirement date serves to select for retirement a significant percentage of judges who are no longer physically and mentally capable of competently performing their job and duties, then the selection of that age is not rationally related to the legislative purpose of insuring a competent judiciary that is vigorous, healthy and mentally and physically capable. Therefore, without proof that the age seventy retirement date insures a healthy judiciary by eliminating a significant percentage of judges who are no longer physically and mentally capable, the Mandatory Retirement Provision violates the Fourteenth Amendment as applied.

ARGUMENT

I. AS APPOINTED JUDGES NOT "ON THE POLICYMAKING LEVEL" PETITIONERS ARE PROTECTED "EMPLOYEE[S]" UNDER THE ADEA AND ARE NOT SUBJECT TO THE MISSOURI CONSTITUTION'S MANDATORY RETIREMENT PROVISION.

A. The ADEA Applies To The States And Protects State Employees Above Age Forty, So Long As Those Employees Do Not Fall Within The Statutory Exemptions From The Definition Of "Employee."

The purpose of the Age Discrimination in Employment Act is "to promote employment of older persons based on their ability rather than age." 29 U.S.C. § 621(b)) (1988). The ADEA now protects any "employee" who is forty years of age or older, 29 U.S.C. § 631(a) (1988), as a result of Congress' amendment of the ADEA by removing any upper age limit.[7] *See* Pub. L. 99-592, § 2(c)(1), 100 Stat. 3342, 3342 (1986). The ADEA makes it unlawful for an employer (1) to discharge any employees because of their age or (2) to classify any employees in ways that adversely affect their status as employees because of their age. 29 U.S.C. § 623(a) (1988). A provision mandating retirement at a certain age unquestionably classifies employees in a way which adversely affects their status as an employee.

Although the ADEA did not originally apply to the states, *see* Pub. L. 90-202, § 11(b), 81 Stat. 602, 605 (1967), Congress amended the ADEA to make it applicable to the states by including them within the definition of an "employer" in 1974. Pub. L. 93-259, § 28(a), 88 Stat. 55, 74 (1974). The ADEA definition of an "employer" includes within its definition "a State or political subdivision of a State or any agency or instrumentality of a State or political subdivision of a State." 29 U.S.C. § 630(b) (1988). This Court has previously upheld the

[7] As originally enacted the ADEA protected people age forty or above, but with an upper age limit of sixty-five. *See* Pub. L. 90-202, § 12, 81 Stat. 602, 607 (1967). In 1978 the upper age limit was raised to seventy. Pub. L. 95-256, § 3(a), 92 Stat. 189, 189 (1978).

constitutionality of applying the ADEA to the states. *EEOC v. Wyoming*, 460 U.S. 226, 243 (1983). Accordingly, as conceded by Governor Ashcroft, the State of Missouri is an "employer" under the ADEA. Brief for Appellee at 4, *Gregory v. Ashcroft*, 898 F.2d 598 (8th Cir. 1990) (No. 89-2360EM).

The ADEA protects individuals that qualify as "employee[s]." 29 U.S.C. § 623(a). *See id.* § 630(f). As pertinent to this case, the ADEA broadly defines an "employee" and limits that definition with certain narrow exemptions:

> The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer, to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.

Id. § 630(f). Because the state of Missouri is an "employer," Missouri state court judges are "employee[s]" unless they fall into one of these specified exemptions. *Id.* § 630(f).

B. Petitioners And Other Similarly Situated State Court Judges Who Have Been Appointed To Office Pursuant To The Missouri Plan Do Not Fall Within The Scope Of The "Elected To Public Office" Exemption From The ADEA's Definition Of "Employee."

Preliminarily, petitioners do not fall into the "elected to public office" exemption. Section 630(f) exempts from ADEA protection "any person elected *to* public office." 29 U.S.C. § 630(f) (emphasis added). Those Missouri judges that are selected pursuant to the Missouri Plan, Mo. Const. art. V, § 25(a), are *appointed* to the bench, *not* elected. As Judge Hungate found in the district court, all of the state's appellate judges, *e.g.*, Judge Nugent, as well as the trial judges in the major metropolitan areas, *e.g.*, Judge Gregory, are *appointed*

and *not elected* to office. *See Gregory v. Ashcroft*, No. 88-0221-C-3, (E.D. Mo. July 14, 1989), *reprinted in* Appendix B of the Petition at A-20 n.3.

Although appointed Missouri judges do submit to a retention referendum, they are not opposed, and the issue is not whether to elect them from among other candidates, but whether to retain them in their appointed office. *See* Mo. Const. art. V, § 25(c)(1), *reprinted in* Appendix C of the Petition at A-27 to A-28. It should be noted that petitioners are specifically prohibited from participating in any political campaign. The Missouri Constitution provides: "No judge of any court in this state, appointed to or retained in office in the manner prescribed in [the Missouri Plan] shall directly or indirectly make any contribution to or hold any office in a political party or organization, or take part in *any* political campaign." Mo. Const. art. V, § 25(f) (emphasis added). If a judge is not retained, or if a vacancy occurs for any other reason such as death or retirement, the vacancy is again filled by the Governor through *appointment* of a replacement. Mo. Const. art. V, § 25(c)(1); *id.* § 25(a).

Under these circumstances, Missouri judges that are appointed pursuant to the Missouri Plan cannot be said to be "elected to public office" within the meaning of that term in the ADEA.[8]

---

[8] Both the First Circuit in *EEOC v. Massachusetts*, 858 F.2d 52 (1st Cir. 1988), and the Eighth Circuit in this case reasoned that Congress must have intended to exempt appointed state court judges from the definition of "employee" in section 630(f) of the ADEA, because it would be "nonsensical" to have appointed judges protected under the ADEA while elected judges were not. Petition at A-11; 858 F.2d at 57.

The Second Circuit expressed sharp disagreement and noted that Congress could easily have exempted judges (if it intended to do so) by specifically including them in the statutory exemption from the definition of "employee." *EEOC v. Vermont*, 904 F.2d 794, 801 (2d Cir. 1990). "Any perceived imprudence in this dichotomy is a matter to be addressed to Congress." *Id.*

C. The Remaining Exemptions From The ADEA Definition Of "Employee," Including That For An "Appointee On The Policymaking Level," Are Limited To Persons Who Work In Conjunction With Or At The Direction Of The Elected Official Who Appointed Them.

1. The Exemptions From The ADEA Definition Of "Employee" Should Be Construed Narrowly.

The ADEA is a remedial statute. *See Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 409-12 (1985). Its purpose is "to promote employment of older persons based on their ability rather than their age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b) (1988). The definition of the persons entitled to its protection should therefore be construed broadly to effectuate Congress' stated remedial intent and purpose. *EEOC v. First Catholic Slovak Ladies Assoc.*, 694 F.2d 1068, 1070 (6th Cir. 1982), *cert. denied*, 464 U.S. 819 (1983). *See Peyton v. Rowe*, 391 U.S. 54, 65 (1968) (remedial statutes should be construed broadly); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (same). For the same reason, exemptions from the protected class of a remedial statute like the ADEA should be construed narrowly. *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). *See also Western Air Lines, Inc. v. Criswell*, 472 U.S. at 413 (narrowly construing the Bona Fide Occupational Qualification (BFOQ) defense under the ADEA in the context of the mandatory retirement).

A. H. Phillips, Inc. v. Walling involved the interpretation of an exemption from the class of persons sought to be protected by the wage and hour provisions of the Fair Labor Standards Act of 1938.[9] *Walling*, 324 U.S. at 491-93. To effectuate that Act's remedial purpose of "ensuring to all our able-bodied working men and women a fair day's pay for a fair day's work," *id.* at 493, this Court held that any exemptions from its coverage must be construed narrowly. *Id.*

---

[9] Fair Labor Standards Act of 1938, Ch. 676, 52 Stat. 1060 (1938) (codified at 29 U.S.C. §§ 201 *et seq.*).

> Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. *To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.*

Id. (emphasis added). As additional support to this well established rule of statutory construction, Congress clearly expressed its intent that the exemption "shall be construed narrowly." *See infra* at 16-17 & n.11, 21.

2. *The Plain Language And Organization Of The Remaining Statutory Exemptions Indicates That The "Appointee On The Policymaking Level" Exemption Includes Only Those Persons Who Make Or Implement Policy In Conjunction With Or At The Direction Of The Elected Official Who Appointed Them.*

The Eighth Circuit's conclusion that appointed state court judges are "appointee[s] on the policymaking level," Petition at A-12, as well as that of other courts,[10] fails to take into account the organization of the remaining statutory exemptions or to effectuate their plain meaning. Having previously shown that the "elected to public office" exemption is inapplicable, *supra* at 13-14, petitioners now address the remaining three statutory exemptions.

> The term "employee" shall not include any person elected to public office . . ., or [1] any person chosen by such officer to be on such officer's personal staff, or [2] an appointee on the policymaking level or [3] an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.

29 U.S.C. § 630(f) (numbers added by petitioners for clarity in discussion).

[10] *E.g., EEOC v. Massachusetts*, 858 F.2d 52, 54 (1st Cir. 1988); *EEOC v. Illinois*, 721 F. Supp. 156, 159-60 (N.D. Ill. 1989); *EEOC v. Massachusetts*, 680 F. Supp. 455, 462 (D. Mass. 1988).

The "appointee on the policymaking level" exemption is placed in the middle of a list of the three remaining exemptions. Both the first and third of those exemptions plainly apply only to persons in an extremely close working relationship with the elected official — either as persons on the official's "personal staff" or as "an immediate advisor." *Id.* Given this limitation on the meaning of the first and third exemptions, well-established principles of statutory construction suggest that the "sandwiched" exemption for an "appointee on the policymaking level" should be similarly limited. *See, e.g., Third National Bank v. Impac Ltd., Inc.*, 432 U.S. 312, 322 (1977); *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961).

In *Jarecki*, this Court held that the word "discovery" may be used "in many contexts and with various shades of meaning." 367 U.S. at 307. By looking at the statute as a whole and not at the term in isolation, and thereby "gather[ing] meaning from the words around it," the *Jarecki* Court gained clarification of the meaning intended by Congress. *Id.* "The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order *to avoid the giving of unintended breadth* to the Acts of Congress." *Id.* (emphasis added).

The phrase "appointee on the policymaking level" is similarly capable of differing shades of meaning. To a degree, any state employees that exercise discretion in the performance of their duties are engaged in policymaking, in its broadest sense. The *Jarecki* reasoning is particularly appropriate in this case to prevent an overly broad interpretation of an exemption from swallowing within its scope the very class of people that Congress sought to protect.[11]

By looking to the context of the phrases surrounding it, the "appointee on the policymaking level" exemption appears to be used by

[11] The legislative history, *see infra* at 18-21, specifically warned that the exemption should be construed narrowly — to avoid the possibility that the exemption would "establish an overall narrowing of the expanded coverage of State and local governmental employees." Conference Report on H.R. 1746 (Section-By-Section Analysis), 118 Cong. Rec. 7167 (1972).

Congress more narrowly than its broadest possible interpretation would allow; the exemption thus construed applies only to persons who advise or work closely with the elected official that chose the appointee. *See EEOC v. Vermont*, 904 F.2d 794, 798 (2d Cir. 1990). This narrow construction gives effect to the remedial intent of Congress in passing the ADEA and making it applicable to the states. *See supra* at 15-16. Narrow construction also comports with the directive in the legislative history that the exemption from the definition of "employee" be construed narrowly. *See infra* at 21; *supra* at 17 n.11.

3. The Legislative History Indicates That The "Appointee On The Policymaking Level" Exemption Includes Only Those Persons Who Implement Or Formulate Policy In Conjunction With Or At The Direction Of The Elected Official Who Appointed Them.

The legislative history of the ADEA is devoid of meaningful discussion of the definition of "employee." The ADEA definition, however, was taken verbatim from the definition passed by Congress two years earlier in amending Title VII of the Civil Rights Act of 1964 and making the Act applicable to the states. *See* The Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 (1972) (exemption codified at 42 U.S.C. § 2000e(f)). This Court has previously found that relevant portions of Title VII's legislative history and judicial interpretation are applicable to the ADEA when the provisions are identical. *See, e.g., Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979); *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). Petitioners therefore rely upon the legislative history of the policymaking exemption in Title VII for guidance in determining Congress' intent when it passed identical language in the ADEA. *Accord EEOC v. Vermont*, 904 F.2d at 798.

Congress' express purpose in passing the exemption from the definition of "employee" was to:

> exclude . . . those persons elected to public office in any state or political subdivision. The exemption extends to persons chosen by such officials to be on their personal staffs, *appointees of such officials on the highest policymaking levels such as cabinet members or other immediate advisors of such elected officials with respect to the exercise of the constitutional or legal powers of the office held by such elected officer.*

Conference Report on H.R. 1746 (Section-By-Section Analysis), 118 Cong. Rec. 7166-67 (1972) (hereinafter "Section-By-Section Analysis") (emphasis added). *Cf.* H.R. Conf. Rep. No. 899, 92nd Cong., 2d Sess. (including *Joint Explanatory Statement of Managers At The Conference on H.R. 1746*) 15-16 (1972) ("persons appointed by such elected officials as advisors or to policymaking positions at the highest levels of the departments or agencies of State or local governments, such as cabinet officers, and persons with comparable responsibilities at the local level") (hereinafter "*Joint Explanatory Statement*"). In describing exempted appointees on the policymaking level as "cabinet members or other immediate advisers" of the elected official who hired them, Congress clearly expressed the limited nature of the exemption, as well as the intimate, ongoing relationship between the exempted "policymaking" appointee and the appointing elected official. *See* Section-By-Section Analysis, 118 Cong. Rec. at 7166-67. Congress explained the purpose of the exemption in its conference report, one of the most reliable indicators of legislative intent. *See National Ass'n of Greeting Card Publishers v. U. S. Postal Serv.*, 462 U.S. 810, 832 n.28 (1983).

The evolution of the exemptions during the legislative process helps explain how and why Congress drafted the version that was eventually enacted into law. The exemptions arose from Senator Ervin's concern that application of Title VII (and thus the ADEA) to the states could allow the results of elections and the selection of close advisors by the elected official to be questioned, based upon alleged discriminatory animus on the part of the electorate or the elected official. 118 Cong. Rec. 4096 (1972) (without exemption, motives of Governor in selecting cabinet could be questioned by EEOC, as could the motives of the people to see if they "were actuated [by discriminatory intent] in any extent in the election of a public official") (remarks of Sen. Ervin).

Senator Ervin first introduced the exemption from the definition of "employee" in a form that excepted only:

> any person elected to public office in any state or political subdivision of any state by the qualified voters thereof, or any persons chosen by such officer to advise him in respect to the exercise of the constitutional or legal powers of his office.

Amendment No. 888 to S. 2515, 92nd Cong., 2d Sess., 118 Cong. Rec. 4095 (1972), *reprinted in*, Senate Subcomm. on Labor of the Comm. on Labor and Public Welfare, *Legislative History of the Equal Employment Opportunity Act of 1972* at 1568 (1972). Senator Williams asked Senator Ervin whether the purpose of his amendment was "to exempt from coverage those who are chosen by the governor . . . and who are in a close personal and immediate relationship with him. Those who are his first line of advisors." *See* 118 Cong. Rec. 4492-93 (1972) (question of Sen. Williams). Senator Ervin acknowledged that "that is the purpose of the amendment." *Id.* at 4493 (statement of Sen. Ervin). *See also EEOC v. Vermont*, 904 F.2d at 799 (general discussion of Senate debate).

The language at issue in this case, regarding "appointees on the policymaking level" was not added to Senator Ervin's amendment on the floor of the Senate, but was contained in the amendment when it emerged from the subsequent conference on the bill. *See* H.R. Conf. Rep. No. 899, 92d Cong., 2d Sess. 1 (1972). During the Senate debate the only mention of "policymaking" in connection with the exemption was by Senator Javits. 118 Cong. Rec. 4097 (1972) (statement of Sen. Javits). Citing his experience as attorney general in New York where he had 500 employees, Senator Javits inquired about "how deep you go when you say 'any person chosen by such officer to advise him. . . .'" *Id.* Senator Javits stated that his understanding of Senator Ervin's amendment exempting elected officials and their advisors was confined "to the higher officials in a policymaking or policy advising capacity." *Id.* Thus, the first mention of policymaking was made by a Senator that was attempting to *limit* the number of exempted advisors to elected officials — to keep the exemption from engulfing large groups of people several levels down the chain of command from the elected official. "Policymaking" was *not* mentioned in the context of creating an *additional* exemption for persons who did not work for the elected official.

Later, Senator Javits renewed his concern with limiting the close adviser and personal staff exemptions to high ranking policymakers working with the elected official in the manner of an executive official's cabinet.

> The other thing, the immediate advisers, I was thinking more in terms of a cabinet, of a Governor who would call his commissioners a cabinet, or he may have a cabinet composed of three of four executive officials, or five or six, who would do the main and important things. *That is what I would define those things expressly to mean.*

118 Cong. Rec. 4493 (1972) (statement of Sen. Javits) (emphasis added). Senator Ervin responded that the amendment as then written, *i.e.*, with what became the first and third exemptions following that for elected officials — personal staff and close advisers of the elected officials — was sufficient to meet Senator Javits' concerns. *Id.* (statement of Sen. Ervin). Eventually, however, the "appointee on the policymaking level" exemption was added by the Conference Committee.[12]

Thus, the language of the exemption, its explanation in the conference committee report, the conference committee's admonition that the exemption be construed "very narrowly," Section-By-Section Analysis, 118 Cong. Rec. 7167 (1972), and the discussion in the debates make it clear that Congress had a single purpose: to exempt elected officials and certain persons who work directly with them. Read as a whole, the exemption applies to elected officials, their personal staff, and their closest and highest level advisors.

---

[12] Perhaps not surprisingly, Senator Javits was one of the managers at the conference where the ultimately enacted language appeared. *See Joint Explanatory Statement* at 22.

D. Missouri's State Court Judges Are Not "Appointee[s] On The Policy making Level" Because (1) They Are Not Policymakers And (2) They Do Not Work With, At The Direction Of, Or As Advisors To The Appointing Authority, As The Exemption Should Be Construed To Require.

1. Missouri State Court Judges Are Not Policymakers.

As the Second Circuit found in *EEOC v. Vermont*, contrary to the Eighth Circuit's conclusion in this case, Petition at A-12, appointed state court judges are not policymakers. *Vermont*, 904 F.2d at 800-01. *See also Schlitz v. Virginia*, 681 F. Supp. 330 (E.D. Va.), *rev'd on other grounds*, 854 F.2d 43 (4th Cir. 1988). A judge's *primary* responsibility is to apply the laws and regulations passed by the legislative and executive branches of government to discrete cases or controversies. *EEOC v. Vermont*, 904 F.2d at 800-01.

Missouri state court decisions confirm that judges are not policymakers. *See, e.g., Brinkmann v. Common School Dist. No. 27*, 238 S.W.2d 1, 6 (Mo. Ct. App. 1951) (despite wish to rule otherwise, court was bound by the law and its "plain duty . . . to apply the law as written by the Legislature and leave to that tribunal the matter of determining questions of legislative policy"), *aff'd*, 255 S.W.2d 770 (Mo. 1953) (*en banc*).

> The questions of *policy* and expediency involved here *were for* the *General Assembly* and the *City Council* of the City of St. Louis. What is for the public good and what are public purposes and uses in the first instance are matters for legislative determination. Those legislative bodies, within their constitutional and statutory powers, may experiment. *Courts determine questions of power, not policy.*

Bader Realty & Investment Co. v. St. Louis Housing Authority, 358 Mo. 747, 217 S.W.2d 489, 493 (1949) (*en banc*) (emphasis added).

> We, too, could philosophize on these subjects, but the *policy* of legislative enactments is *not* for the courts. It is for the legislature. We should not "judicially legislate" so as to broaden the plain letter of the statute.

State v. One "Jack and Jill" Pinball Machine, 224 S.W.2d 854, 859 (Mo. Ct. App. 1949) (emphasis added).

As the above cases specifically set forth, Missouri state court judges are not vested with "policymaking" authority. Civics classes throughout this Republic teach that the function of the judicial branch of government is to decide disputes in actual cases in accordance with the laws and regulations passed by the other branches of government. The judicial branch's review of the validity of laws and regulations is limited to determining whether the legislative and executive branches exceeded their authority in promulgating the laws and regulations. While a court may occasionally render "momentous" decisions that some may characterize as "policymaking," *e.g., Cruzan v. Director, Missouri Dept. of Health*, __ U.S. __, 110 S. Ct. 2841 (1990), for every such case there are dozens of others which involve policy only to the extent that they declare or apply that chosen by Congress. For several reasons, the occasional "momentous" court decision does not make judges "policymakers."

First, with respect to the occasional "momentous" decision, the better position is that such decisions interpret or apply the policy set forth in existing constitutions or laws. Thus, the right to die by refusing food and water is not a "policy" decision established by this or any other court, but is instead a policy that already is embodied and declared as a "liberty interest" in the United States Constitution, *Cruzan*, 110 S. Ct. at 2851 n.7 (1990), or as a specific right granted by statute. *See McConnell v. Beverly Enterprises-Connecticut, Inc.*, 209 Conn. 692, 705, 553 A.2d 594, 603 (1989). The magnitude and effect of these or any other "momentous" decisions may be great, but the policy was "made" when the statute or constitutional provision was passed or ratified, and not when the particular court announced its opinion.

Second, with respect to petitioners, Judge Nugent, as a court of appeals judge, is bound to follow the precedents of the Missouri

Supreme Court. Likewise, Judge Gregory, as an associate circuit judge, is bound to follow the pronouncements of the appellate courts. Moreover, as an *associate circuit judge*, he is on unequal footing with his fellow trial judges on the circuit court, the *circuit judges*, to the extent that he is denied the right given them to make the circuit court rules. *See* Mo. Const. art. V, 15(1). *Cf. Id.* § 15(3) (associate circuit judges may *vote* for presiding circuit judges, although they are not *eligible* to *be* presiding judge). To the limited extent that judges may engage in "policymaking," any such policymaking function is progressively less as the level of the judge within the judiciary is lower. It should be clear that petitioners are not policymakers.

As was succinctly stated by Judge Kearse for the Second Circuit, "the performance of traditional judicial functions is not policymaking." *EEOC v. Vermont*, 904 F.2d at 800. In disagreeing, the Eighth Circuit stated that judges are policymakers because in cases of first impression they "resolve issues previously unsettled and thus . . . create law." Petition at A-6. Judge Kearse rebutted that contention as follows:

> The principle business of the courts is the resolution of disputes. In some cases, the courts resolve those disputes merely by applying established legal principles; in others, they must determine what legal principles apply when there is a lacuna in the law or determine how seemingly conflicting legal principles are to be reconciled. Even in the latter type of case, however, the courts are called upon primarily to fathom the nature and contours of policies established by the legislative and executive branches rather than to create or fashion new policy.

904 F.2d at 800. This Court should adopt the Second Circuit's reasoning and conclude that appointed state court judges are not policymakers.

2. *Missouri State Court Judges Are Not "Appointees On The Policymaking Level" Because They Do Not Work Closely With, At the Direction Of, Or As Advisors To The Appointing Authority, The Governor.*

The policymaking exemption, construed as advocated by petitioners, requires a close working relationship with the elected official. *See*

supra at15-21. Missouri state court judges clearly do not work with, at the direction of, or as advisors to the appointing authority, Governor Ashcroft. Therefore, they fall outside the scope of the policymaking exemption.

The Missouri Constitution specifically provides for the distribution and separation of powers among the three branches of government. Mo. Const. art. II, § 1. That provision specifically provides:

> The powers of government shall be divided into three distinct departments — the legislative, executive, and judicial — each of which shall be confined to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this Constitution expressly directed or permitted.

Id. See In re Pate, 107 S.W.2d 157, 162 (Mo. Ct. App. 1937) (the three governmental branches are each "given certain inherent powers" and each "must be kept separate and must operate in its own sphere"). The separation of powers requirements of the Missouri Constitution therefore preclude the Missouri judiciary from working with or at the direction of Governor Ashcroft.

The Missouri courts "will not render advisory opinions." *State ex rel. Dahl v. Lange*, 661 S.W.2d 7, 8 (Mo. 1983) (*en banc*). *See International Telephone & Telegraph Corp. v. Smith*, 687 S.W.2d 194, 195 (Mo. 1985) (*en banc*) (Missouri Supreme Court has "long established practice of refusing to render advisory opinions"). The Missouri Circuit Courts and Missouri Court of Appeals "are without jurisdiction to render advisory opinions." *Wasinger v. Labor and Industrial Relations Comm'n*, 701 S.W.2d 793, 794 (Mo. Ct. App. 1985). Thus, the Missouri judiciary does not advise Governor Ashcroft on matters of policy.

Even if this Court were to conclude that some or all of the Missouri judiciary are "policymakers," it should hold that Missouri state court judges are not "appointee[s] on the policymaking level" under the ADEA. The Missouri judiciary does not advise Governor Ashcroft or

otherwise assist him in implementing and formulating policy, which the "appointee on the policymaking level" exemption should be construed to require. *See supra* at 15-21. Missouri's appointed state court judges therefore fall outside the scope of the exemption.

E. Conclusion.

For all the reasons set forth in the foregoing sections, this Court should hold that petitioners are protected employees under the ADEA. Accordingly, the Eighth Circuit's judgment should be reversed and enforcement of the Mandatory Retirement Provision against Missouri Plan judges like petitioners should be permanently enjoined.

II. THE MISSOURI CONSTITUTION'S MANDATORY RETIREMENT PROVISION VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Petitioners' second question presented is whether the Missouri Constitution's Mandatory Retirement Provision violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The class being discriminated against and denied equal protection is composed of state court judges of age seventy or above — regardless of whether the judge was initially appointed to office by the Governor pursuant to the Missouri Plan, or elected to office in the partisan general elections for certain circuit judges.[13] The Mandatory Retirement Provision disadvantages petitioners in favor of two separate groups — appointed and elected judges younger than age seventy, and all other state employees over the age of seventy in non-physically demanding jobs. Petitioners contend that there is no legitimate, rationally based purpose to support the Mandatory Retirement Provision. Governor Ashcroft[14] and the Eighth Circuit disagreed. Motion to Dismiss, J.A. at 10; Petition at A-16.

[13] Former Plaintiff McHaney was an elected circuit judge before he was forced to retire upon turning seventy on September 25, 1990.

In affirming the district court's dismissal of petitioners' equal protection claim, the Eighth Circuit relied primarily upon four reasons that purportedly provided a rational basis for Missouri's Mandatory Retirement Provision. Petition at A-15. These reasons were identified

[14] In his answers to interrogatories, Governor Ashcroft set forth a number of "reasons" that provide "rational bases" for the Mandatory Retirement Provision. Defendant's Answers to Plaintiffs' First Set of Interrogatories at 2-5, *Gregory v. Ashcroft*, No. 88-0221-C-3 (E.D. Mo. filed July 14, 1989) (hereinafter "Defendant's Answers to Interrogatories"). The Governor quoted and relied primarily upon reasons initially set forth by the Missouri Supreme Court in a 1978 case. *Id.* at 2-4. *See O'Neil v. Baine*, 568 S.W.2d 761, 766-67 (Mo. 1978) (*en banc*). The Governor also alleged that:

> It is also trued that a mandatory retirement policy for judges allows the judiciary, the governor, the Missouri bar, and the electorate to plan for and anticipate the appointment and advancement of qualified judicial candidates and present lower court judges. It is also true that a mandatory retirement policy motivates younger lawyers, and prospective lawyers, to strive hard for and to obtain the experience and legal knowledge necessary to attaining judicial positions, in the knowledge that vacancies will predictably occur.

Defendant's Answers to Interrogatories at 4.

When asked to "[i]dentify all persons who have knowledge of the rational basis for this provision," *id.* at 2, the Governor responded as follows:

> Every person understands, or should understand, the reasons or rational bases for a provision requiring the mandatory retirement of state court judges. Clearly it is impossible to identify every such person, *because the knowledge at issue is a matter of good common sense and an understanding of the vicissitudes of life and the aging process*. The defendant cannot believe that plaintiffs are serious in asking for the identity of all persons knowing about the "rational basis" for the existence of a state statute or constitutional provision. To the extent such an inquiry is ever answerable, we believe the first two sentences of this response are as complete as possible.

Defendant's Answers to Interrogatories at 5 (emphasis added).

Petitioners can understand why no one was specifically identified as having knowledge of the rational basis for the Mandatory Retirement Provision. "[G]ood common sense and an understanding of the vicissitudes of life and the aging process" can be understood in this context to mean "people over seventy just can't cut it."

as (1) "maintaining a highly qualified and vigorous state judiciary," allegedly obtained by drawing a line "at an age at which there is often a lessening in mental and physical abilities"; (2) avoiding the difficult determination of whether a judge is physically or mentally qualified; (3) increasing opportunities for younger lawyers; and (4) "ease in establishing and administering judge's pension plans." Petition at A-15.

The Eighth Circuit relied upon these bald assertions as justification for the Mandatory Retirement Provision, in contravention of the teachings of this Court's Equal Protection cases. The classification at issue in this case is age, and this Court has previously held that age is not a suspect class. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976). *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 441 (1985). Nevertheless, this Court has included the aged with the disabled, the mentally ill and the infirm, as groups which have "immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large." *Cleburne*, 473 U.S. at 445-46. Accordingly, while heightened scrutiny would be inappropriate under these cases,[15] the aged are still entitled to meaningful and considered review under the rational basis standard: "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Id.* at 446.

The Eighth Circuit concluded that Missouri's Mandatory Retirement Provision for judges who have reached the age of seventy withstands the rational basis test, *i.e.*, the distinction between judges over and under the age of seventy is rationally related to legitimate governmental purposes. Petition at A-16. Measuring the four purposes previously identified as rational bases for the Mandatory Retirement Provision, *supra* at 28, against the standard identified in *Murgia* and *Cleburne*, the Eighth Circuit decision cannot stand.[16]

[15] An amicus brief suggests that heightened scrutiny should be applied in this case. *See* Brief of Amicus Curiae The Honorable John W. Keefe at 4-6, *Gregory v. Ashcroft*, No. 90-50 (U.S. *cert. granted* Nov. 26, 1990).

In *Cleburne* this Court struck down as arbitrary and irrational a zoning classification that singled out the mentally retarded, because the purposes allegedly supporting that classification were equally applicable to other groups that were not subjected to the same limitation. 473 U.S. at 447-48. In *Cleburne* a group home for the mentally retarded was required to obtain a special use permit when other permitted uses such as apartment houses, fraternity houses, dormitories, hospitals and nursing homes were not. *Id.* This Court concluded that the distinction was not constitutionally permissible because the record did not reveal any rational basis for believing that the group home for the mentally retarded posed any special threat to the city's legitimate interests in a way that other permitted uses like boarding houses and hospitals would not. *Id.* at 448.

Three of the four principal criteria relied upon by the Eighth Circuit as rational bases for Missouri's Mandatory Retirement Provision are equally infirm under *Cleburne*. The tedious, difficult and potentially embarrassing task of determining which judges are not physically and mentally qualified is no more onerous than the task of identifying which of any other state employees in non-physically demanding jobs are not mentally or physically qualified. Moreover, Missouri already has in place a far less restrictive alternative to mandatory retirement — the Commission on the Retirement, Removal and Discipline of Judges.

[16] To the extent that this Court's decision in *Vance v. Bradley*, 440 U.S. 93 (1979), supports the Eighth Circuit's decision in this case, petitioners submit that *Vance* is distinguishable. Petitioners do not face the "rigors of overseas duty" — a physical requirement not present in this case. *Cf. Vance*, 440 U.S. at 98. Nor has the state asserted the existence of a morale problem or need "to stimulate superior performance in the ranks." *Cf. id.* Moreover, to the extent that *Vance* may not be distinguishable, petitioners suggest that its analysis has been implicitly overruled by *Cleburne*.

Mo. Const. art. V, § 24(2).[17] Likewise, the provision of increased opportunities for the young results equally from the imposition of a mandatory retirement age in all state employment opportunities. Finally, the ease gained in establishing and administering judges' pension plans by having a mandatory retirement age is no greater than would be gained in any other pension plan administered by the State of Missouri.

Missouri's state court judges above age seventy do not threaten, to a greater extent than any other group of septuagenarian state employees, Missouri's interest in (1) avoiding difficult employee evaluations; (2) providing new employment opportunities for the young; and (3) administering state pension plans with ease. Accordingly, under *Cleburne* these three supposedly rational bases for Missouri's Mandatory Retirement Provision are irrational and violate the Equal Protection Clause of the Fourteenth Amendment. 473 U.S. at 448.

The remaining purpose relied upon by the Eighth Circuit as a rational basis for Missouri's Mandatory Retirement Provision is Missouri's interest "in maintaining a highly qualified and vigorous state judiciary" by drawing "a line at an age at which there is often a lessening in mental and physical abilities." Petition at A-15. This objective is nearly identical to the objective of the State of Massachusetts in the *Murgia* case, *i.e.*, the "physical preparedness" of the police. *See Murgia*, 427 U.S. at 314-15. This Court there upheld the rationality of an age fifty mandatory retirement date for state policemen. *Id.* at 314. In that case, however, an extensive factual record was developed in the district court. *Id.* at 310. This Court upheld the mandatory retirement age, but with the qualification that there "is no

[17] The pertinent Missouri constitutional provision for the Commission on the Retirement, Removal and Discipline of Judges provides:

> Upon recommendation by an affirmative vote of at least four members of the commission, the supreme court en banc shall retire from office any judge . . . who is found to be unable to discharge the duties of his office with efficiency because of permanent sickness or physical or mental infirmity.

Mo. Const. art. V, § 24(2).

indication that [the mandatory retirement statute] has the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion wholly unrelated to the objective of the statute." *Id.* at 315-16.

Like *Murgia*, there is no indication in this case that the age seventy retirement date for Missouri's state court judges has the effect of excluding from service a significant percentage of judges who are unqualified. Unlike *Murgia*, petitioners were not allowed to present their evidence in court — evidence which they assert would show that Missouri's selection of an age seventy retirement date excludes so few "unqualified" judges that it cannot be rationally related to the goal of insuring a vital, vigorous and healthy judiciary.[18] Given this failure of proof, the remaining ground upon which the Eighth Circuit relied in finding a rational basis is wholly irrational, arbitrary and capricious.

Thus, the Eighth Circuit's rational basis analysis is fatally flawed and violates the precedents of this Court's equal protection law.

[18] For an extensive discussion of the fallacy of decreased performance with increased age see Brief Amicus Curiae Of American Association of Retired Persons at nn.20-26, 29-38 and accompanying text, *Gregory v. Ashcroft*, No. 90-50, (U.S. *cert. granted* Nov. 26, 1990).

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court reverse the Eighth Circuit judgment and enter judgment for petitioners with respect to the ADEA claim on the grounds that petitioners are not "policymakers" or otherwise exempted from the definition of "employee" and hence are protected under the ADEA.

With respect to the equal protection claim, petitioners request that this Court vacate the Eighth Circuit judgment and remand, but for a determination only of whether the Missouri Constitution's Mandatory Retirement Provision excludes so few "unqualified" judges, from among the many qualified judges now being forced to retire, that it is not rationally related to Missouri's asserted purpose of insuring a judiciary which is both mentally and physically capable, vigorous and healthy.

DATED this 14th day of January, 1991.

Respectfully submitted,

Thomas J. Guilfoil
Jim J. Shoemake
Bruce Dayton Livingston
Counsel of Record
Guilfoil Petzall & Shoemake
100 North Broadway, Suite 2000
St. Louis, Missouri 63102
(314) 241-6890

Attorneys for Petitioners